

**UNITED STATES OF AMERICA
BEFORE THE NATIONAL LABOR RELATIONS BOARD**

M & M AFFORDABLE PLUMBING, INC.)	
)	
and)	Case 13-CA-121459
)	
JEFFREY CEREN, an Individual.)	

**RESPONDENT’S REPLY BRIEF IN SUPPORT OF EXCEPTIONS
TO THE ADMINISTRATIVE LAW JUDGE’S DECISION**

Pursuant to Section 102.46 of the National Labor Relations Board’s Rules and Regulations, Respondent, M & M AFFORDABLE PLUMBING, INC. (“MM”), submits this reply brief in further support of its exceptions to the Decision and Order of Administrative Law Judge Melissa M. Olivero:¹

Introduction

1. This case has been built upon lies, twisted facts and broken logic from its inception. Despite his many deceits, Jeffrey Ceren has coaxed the General Counsel into pressing fabricated and ever-changing claims. Even after admitting at hearing to holding an estimating position in management with MM and that his agreement with MM hinged upon union approval – *not* union withdrawal – Mr. Ceren somehow gained the sympathies of the ALJ and ultimately obtained inexplicable findings against MM. The ALJ’s decision is shocking given the aforementioned admissions as well as the record as a whole.

A. Managerial Employee

¹ Throughout these exceptions and Respondent’s supporting briefs, citations to the records shall be as follows: the ALJ’s decision shall be “JD [Page]:[Line]”; the hearing transcript shall be “Tr. [Page]”; the General Counsel’s exhibits shall be “GCX [Number]”; and Respondent’s exhibits shall be “RX [Number].”

2. First, in admitting to the estimating position in management, Mr. Ceren lost any hope of securing the protections afforded under the National Labor Relations Act (the “Act”). It is well-settled that managerial employees are not afforded the protections of the Act. *N.L.R.B. v. Bell Aerospace*, 416 U.S. 267, 94 S.Ct. 1757 (1974). Managerial employees have been consistently defined as those who “formulate and effectuate management policies by expressing and making operative the decisions of their employer.” *Id.* at 289. Specifically, the Labor Board’s existing precedent going back nearly sixty-five years has established that estimators are considered managerial employees under the Act. *Aeronica, Inc.*, 221 N.L.R.B. 69 (1975); *Enclosure Corporation*, 225 NLRB 82 (1976); *General Dynamics Corporation*, 213 NLRB 851 (1974); *Bulldog Electric Products Co.*, 96 NLRB 85 (1951) and *Pullman Standard*, 214 NLRB 100 (1974).

3. In response, the General Counsel attempts to argue that discretion is the hallmark of management under the Act. The General Counsel then concludes that because Mr. Ceren testified to a lack of authority to sign contracts, he cannot be considered a managerial employee. However, this argument ignores the holding in *General Dynamics* where estimators who were merely privy to pricing and profits were deemed managerial employees. Incidentally, the estimators lacked authority to negotiate and sign contracts. However, the estimators’ intimate knowledge about pricing and profit sufficiently aligned them with management. *General Dynamics Corporation*, 213 NLRB 851 (1974). Similarly, in *Pullman Standard*, estimators were found to be managerial employees because they were privy to the precise labor rates of the employer. *Pullman Standard*, 214 NLRB 100 (1974). Interestingly, neither the ALJ, nor the General Counsel has cited any precedent where estimators were afforded the protections under the Act.

4. Further, the General Counsel’s discretion argument relies on Mr. Ceren’s fabricated direct

examination and ignores the concessions he made on cross examination. On cross examination, Mr. Ceren admitted to his involvement in setting prices as well as his intimate knowledge about MM's expected profits. (Tr. 215-216). He also conceded that the position involved "going out and meeting new contractors" and pricing "change orders out," (Tr. 208, 216), as well as "creating the bid sheet and looking at pricing" and setting the "proposal price." (Tr. 201). Thus, while Mr. Ceren might not have possessed authority to sign contracts, he clearly had the discretion to set the pricing.

5. Neither the ALJ, nor the General Counsel should be allowed to ignore sixty-five years of legal precedent. Mr. Ceren's undeniable involvement as an estimator in pricing, customer negotiation and profits, as well as his knowledge as to MM's labor rate, (Tr. 118), places him squarely within existing precedent which recognizes estimators as managerial employees. See *Aeronica, Inc.*, 221 N.L.R.B. 69 (1975); *General Dynamics Corporation*, 213 NLRB 851 (1974) and *Pullman Standard*, 214 NLRB 100 (1974). As such, Mr. Ceren was not entitled to the protections of the Act.

B. Union Approval

6. Second, in conceding that his agreement with MM was contingent upon the Union's approval of his position and not Mr. Ceren's withdrawal from the Union, Mr. Ceren destroyed the supposed motivation behind MM's alleged violation of the Act, i.e. the supposed "yellow dog" contract.

7. Indeed, the ALJ improperly concluded that MM violated the Act in terminating Mr. Ceren's purported employment on September 24, 2013 to avoid paying him union wages. (JD 7:46-47). Mr. Ceren's testimony is in direct contradiction to any such conclusion. (Tr. 185, 220-1). Specifically, Mr. Ceren testified at the hearing as follows:

Q. Your agreement with M & M Affordable Plumbing was that you would work as an estimator, in non-jurisdictional, non-bargaining unit work, correct?

A. Correct.

Q. And that you would be paid a salary, correct?

A. Correct.

Q. And that the union had to approve it, correct?

A. Correct. (Tr. 220-1).

8. The ALJ's failure to credit Mr. Ceren's concessions as to the nature of his agreement with MM led to the erroneous conclusion that he was terminated for failing to withdraw from the Union. In fact, Mr. Ceren's association with MM ended because he failed to obtain union *approval*, which is entirely different than the General Counsel's mischaracterization (and the ALJ's adoption thereof) of that term of the agreement. (Tr. 221).

9. The ALJ's failure in this instance also highlights two other illogical and contradictory findings. First, that even though Mr. Ceren's employment was purportedly conditioned upon Union withdrawal, he was hired and fired before the withdrawal was refused. Second, that Mr. Ceren was fired in an attempt to avoid union wages, yet as an estimator, Mr. Ceren was not entitled to union scale.

C. Credibility

10. Finally, the General Counsel attempts to bolster the ALJ's credibility determinations using the same faulty logic as the ALJ. Specifically, in accepting Mr. Ceren's direct examination over his cross-examination, the ALJ argued that such is allowed because Mr. Ceren's testimony need not be destroyed by past instances of deceit. However, the ALJ and General Counsel ignore the fact that

while past deceit was at play in Mr. Ceren's testimony, his concessions on cross examination also established a present attempt to deceive.

11. While the various admissions are thoroughly detailed in MM's original brief, Mr. Ceren's entire charade is destroyed at the very outset of cross examination. Therein, Mr. Ceren testified that he was truthful in all his dealings with the Labor Board, Union and MM. His specific testimony is as follows:

Q. Mr. Ceren, you are a truthful person; is that correct?

A. Yes, sir.

Q. You were truthful in your testimony here today?

A. Yes, sir.

Q. You were truthful when you filed your charges, the three charges you filed with the National Labor Relations Board?

A. Yes, sir.

Q. You swore to tell the truth in those charges, didn't you?

A. Yes, sir.

Q. You were truthful in your dealings with the union?

A. Yes, sir.

Q. You were truthful in the letters you wrote to the union?

A. I was truthful, yes.

Q. And you were truthful in your dealings with M & M Affordable Plumbing and Mike Malak; is that correct?

A. Yes. (Tr. 173).

12. The aforementioned concessions, at the very least, establish the veracity of the very Charges, letters and statements of Mr. Ceren that the ALJ and General Counsel want to discredit as lies. Given the concessions, the ALJ should not have accepted the contradictory fabrications elicited from in Mr. Ceren's direct examination. Thus, the statements contained in Mr. Ceren's various Charges, letters and otherwise must control over the tail he spun on direct examination.

Conclusion

13. For the reasons set forth above as well as detailed in Respondent's Brief In Support Of Exceptions To the Administrative Law Judge's Decision, MM respectfully request that the Board grant its exceptions and dismiss the Complaint in its entirety.

Respectfully Submitted,

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